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No. 90-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.E. JOHNSON COMPANY, *et al.*,
Petitioners,

v.

ARTHUR S. LANGENDERFER, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Is there a dangerous probability of a firm achieving, or can it have, monopoly power in a government contract bid market where there is neither allegation nor evidence of collusion, there are other competitors and entry has occurred?

2. Does a monopolist cause antitrust injury by pricing above its own, but below its rival's, costs?

LIST OF PARTIES

The parties to the proceeding below were the petitioners S.E. Johnson Company, S.E. Johnson Companies, Inc., The Ohio Engineering Company, Fred R. Creager & Sons, Inc., MATCO Asphaltic Concrete Producing Co., OAMCO, Inc., C.P. Calaway, Inc., Maumee Stone Company, Michigan Stone Company, Wolcottville Sand & Gravel Corp., Saxon Development Company, Stoneco, Inc., and J.T. Kirkby and the respondents Arthur S. Langenderfer, Inc., Northern Ohio Asphalt Paving Co., MacRitchie Materials, Inc., M&B Asphalt Co., Inc., G.M. Sader Excavating & Paving Co., Inc. Petitioners have no parent corporations, subsidiaries, or affiliates to list pursuant to Rule 29.1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION TO REVIEW	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. INTRODUCTION	3
B. THE HIGHWAY PAVING INDUSTRY IN NORTHWEST OHIO	3
C. COMPETITION INCREASED IN THE 1970S AND HAS REMAINED VIGOROUS EVER SINCE	4
D. THE FIRST TRIAL AND APPEAL	5
E. THE SECOND TRIAL AND APPEAL	6
REASONS FOR GRANTING THE WRIT	7
I. MONOPOLY POWER MAY NOT BE FOUND IN A GOVERNMENT CONTRACT BID MARKET WHERE ACTUAL AND POTENTIAL COMPETITORS ARE PRESENT	10
A. Market Share Does Not Establish Monopoly Power In a Bid Market	10
B. Monopoly Power Cannot Exist In A Bid Market As Long As Other Firms Have The Ability To Compete	11
II. A MONOPOLIST'S LOW, NON-PREDATORY PRICES DO NOT GIVE RISE TO ANTITRUST INJURY TO A COMPETITOR	13
CONCLUSION	20

TABLE OF AUTHORITIES

Page

Cases:

Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984) 2,5,14,15,18

Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990) 9,13,14,17,18,19

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 9,13,17,18

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 9,13,14,15,18,19

Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) 12

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 18

Kirk-Mayer, Inc. v. Pac Ord, Inc., 626 F. Supp. 1168 (C.D. Cal. 1986) 12

Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 9,13,14,19

National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984) 9,11

National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020 (8th Cir. 1985) 12

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) 18

United States v. El Paso Nat'l Gas Co., 376 U.S. 651 (1964) 11

Statutes:

Clayton Act, § 4(a), 15 U.S.C. § 15(a) (1988) 2,5,7

Sherman Act, § 2, 15 U.S.C. § 2 (1988) 2

23 U.S.C. § 112 (1988) 4

28 U.S.C. § 1254 (1988) 2

Table of Authorities Continued

	Page
28 U.S.C. § 1291 (1988)	5,6
28 U.S.C. § 1331 (1988)	5
28 U.S.C. § 1337 (1988)	5
41 U.S.C. § 253(a) (1988)	4
Ohio Rev. Code Ann., Ch. 5525 (Page 1985)	4
Ohio Rev. Code Ann., Ch. 5537 (Page 1985)	4
Miscellaneous:	
ABA Monograph, *Horizontal Mergers: Law and Policy* (1986)	10
Dameron and Sherry, *Son of Scanwell: Antitrust Challenges to Government Contracts Awards and Related Actions*, 17 Pub. Cont. L.J. 500 (June 1988)	7
Department of Justice Antitrust Guidelines for International Operations, 53 Fed. Reg. 21584 (1988)	11
FTC Statement on Horizontal Mergers, 4 Trade Reg. Rep. (CCH) ¶ 20,902 (1982)	11
1984 Merger Guidelines of Department of Justice, 4 Trade Reg. Rep. (CCH) ¶ 13,103	11
Work, *Antitrust Issues Relating to Arrangements and Practices of Government Contractors and Procuring Agencies in Markets for Specialized Government Products*, 57 Antitrust L.J. (1988)	8

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Petitioners S.E. Johnson Company, S.E. Johnson Companies, Inc., The Ohio Engineering Company, Fred R. Creager & Sons, Inc., MATCO Asphaltic Concrete Producing Co., OAMCO, Inc., C.P. Calaway, Inc., Maumee Stone Company, Michigan Stone Company, Wolcottville Sand & Gravel Corp., Saxon Development Company, Stoneco, Inc. and J.T. Kirkby (collectively "Johnson") respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on October 29, 1990.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 917 F.2d 1413, and is reprinted in the appendix to case

number 90-1581 filed in this Court on April 12, 1991.[1] (App. A1). The Order of the Court of Appeals denying rehearing is unreported. (*Id.* at A122). The opinion of the Court of Appeals following the first trial in this case is reported at 729 F.2d 1050.

JURISDICTION TO REVIEW

The Court of Appeals rendered judgment on October 29, 1990. (App. A1). Timely petitions for rehearing were denied on January 23, 1991. (*Id.* at A122). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1988), which provides in relevant part:

> Every person who shall monopolize or attempt to monopolize . . . any part of the trade or commerce . . . shall be deemed guilty . . . .

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a) (1988), which provides in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . .

The full text of these statutes is reprinted in the referenced appendix. (App. A124-25).

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[1] Citations to "App." throughout this Petition are to the Appendix in case number 90-1581.

STATEMENT OF THE CASE

A. INTRODUCTION

This petition asks the Court to examine two important questions arising under the antitrust laws. First, is there any danger that a firm may achieve monopoly power in a bid market where there are other bidders, no barriers to entry and no evidence of collusion? Second, does a competitor suffer antitrust injury by reason of a monopolist's low, but nonpredatory bids?

In affirming a judgment for respondent Arthur S. Langenderfer, Inc. ("Langenderfer"), the Sixth Circuit held that a firm that consistently wins contracts by submitting profitable low bids is guilty of monopolization and liable to its less efficient competitors for treble damages. This ruling undercuts the policies embodied in the antitrust law by penalizing aggressive competition and rewarding inefficiency. It has far-reaching implications for taxpayers and all government agencies that award contracts by competitive bid because it cautions bidders that low bidding can lead to antitrust liability to inefficient competitors.

B. THE HIGHWAY PAVING INDUSTRY IN NORTHWEST OHIO

This litigation results from increased competition for competitively bid highway paving contracts awarded by the Ohio Department of Transportation ("ODOT") and the Ohio Turnpike Commission ("OTC") in a thirteen-county area of northwest Ohio.

Ohio law, like many other government procurement laws,[2] requires competitive bids for road construction

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[2] Federal law mandates competitive bidding in numerous con-

contracts. Ohio Rev. Code Ann., Chs. 5525 and 5537 (Page 1985). The letting authorities determine where and if a project will be let, award contracts to the lowest qualified bidder, and reserve the right to reject any and all bids. *Id.* Since there is no product differentiation, firms compete on price alone.

C. COMPETITION INCREASED IN THE 1970S AND HAS REMAINED VIGOROUS EVER SINCE

The amount of paving work in northwest Ohio dropped by more than half in the 1970s. At the same time, new contractors entered the market and the number of bidders per job increased. Prices fell.

Johnson met the competitive challenge by becoming more efficient, diversifying into related work and expanding into new areas. This enabled Johnson to bid more jobs at lower prices. Consequently, although Johnson's net margin declined, its total revenues and total profit increased.

Langenderfer pursued a different strategy. It did not expand, diversify or take other steps to reduce costs. Langenderfer increased the volume of ODOT and OTC work it performed, but suffered ever-increasing losses because its bids did not always cover overhead.

Unable to compete, Langenderfer invited Johnson to "raise bid prices" and to "stabilize the market."

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texts. Generally, executive agencies are required to obtain full and open competition in the procurement of property or services preferably through the use of sealed bids. 41 U.S.C. § 253(a) (1988). Similarly, federal law requires competitive bidding for federal expenditures for highway construction and repair. 23 U.S.C. § 112 (1988). All fifty states and the District of Columbia require competitive bidding in one circumstance or another.

Johnson refused, and Langenderfer sued, complaining that Johnson was bidding too low and violating Section 2 of the Sherman Act. Langenderfer thus invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1337 (1988) and 15 U.S.C. § 15(a).

Although Langenderfer went out of business in 1978, competition has not slackened. Since then, fifty-one different contractors have bid on, and twenty-three have won, jobs in the relevant market. New firms continue to enter. Prices, and profit margins, remain low.[3]

D. THE FIRST TRIAL AND APPEAL

Langenderfer and a sister asphalt paving producer commenced this litigation in 1976. At the first trial in 1980, Langenderfer complained that Johnson's above-cost bids constituted predatory pricing. Johnson appealed and Langenderfer cross-appealed under 28 U.S.C. § 1291 (1988). The Sixth Circuit reversed a judgment for plaintiffs, holding that Johnson was not required to maintain artificially high prices for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." 729 F.2d at 1057. Although evidence of anticompetitive conduct was "meager at best," the Sixth Circuit remanded for a second trial. *Id.* at 1055 n.9.

E. THE SECOND TRIAL AND APPEAL

At the second trial, additional contractors and Langenderfer's affiliated limestone quarry joined as plaintiffs. Plaintiffs contended that, beginning in 1971,

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[3] The stated facts, all based on respondents' evidence, are not disputed.

Johnson monopolized and attempted to monopolize the production and supply of raw materials (asphalt, limestone and sand) for ODOT and OTC paving jobs. Plaintiffs also contended that Johnson monopolized and attempted to monopolize the bidding and performance of such contracts, and that Johnson had engaged in various anticompetitive acts made possible by market power in the raw material markets. The jury returned a verdict for each plaintiff.

Both parties again appealed under 28 U.S.C. § 1291. The Sixth Circuit reversed judgments for each plaintiff except Langenderfer. The Sixth Circuit held that:

1) There was no evidence that Johnson either possessed or was likely to obtain monopoly power in any raw material market (App. A33-34, A37-38, A40, A41, A42-43);

2) Johnson achieved scale economies that enabled it to operate at a lower cost (*id.* at A55, A60);

3) there was no basis for the allegations that Johnson engaged in the specified anticompetitive conduct (*id.* at A53-54, A60);

4) Johnson had not engaged in predatory pricing (*id.* at A55);

5) Johnson's low bidding benefited the public and had continued for many years (*id.* at A15, A55, A67-68); and

6) new competitors had entered the market (*id.* at A14, A70).

The Sixth Circuit, stating that "the issue is a very close one," affirmed the decision for Langenderfer

(*id.* at A61), holding that there was a sufficient factual showing to support a finding that Langenderfer suffered injury that resulted from "a lessening of competition due to acquisitions or from 'anticompetitive acts made possible' by the acquisitions." (*Id.* at A60). The lengthy opinion eschews any explanation of the basis for its holding that Johnson monopolized a bid market, or that acquisitions (without proof of subsequent anticompetitive conduct) caused Langenderfer to suffer antitrust injury.

Johnson filed a petition for rehearing. Langenderfer and the other plaintiffs filed a petition for rehearing and a suggestion that the rehearing be *en banc*. The Sixth Circuit denied the petitions on January 23, 1991.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit now holds that an aggressive firm that cuts prices and refuses to rig bids may nevertheless face treble damage payments for losses by less efficient competitors. The consequences of this interpretation of Section 2 are less competition and higher prices. The antitrust laws cannot intend such a perverse result.

The Court should review the Sixth Circuit's rule because it may stifle competition in bid markets. Firms that once were urged to bid as low as possible and to win the most contracts may now be content to bid higher and win fewer jobs.[4] The holding thus

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[4] Commentators have cited the Sixth Circuit's first decision in this case as one of the cases involving application of the antitrust laws to government contracting. Dameron and Sherry, *Son of Scanwell: Antitrust Challenges to Government Contracts Awards and Related Actions*, 17 Pub. Cont. L.J. 500, 502 n.5 (June 1988);

creates a fundamental conflict between competitive bid statutes and the antitrust laws. A contractor like Johnson cannot know whether its low bid, submitted in full compliance with the letter and spirit of competitive bid statutes, will be treated by the courts as aggressive competition or monopolizing conduct. This conflict demonstrates that the Sixth Circuit has misconstrued the antitrust laws.

Competitive bidding to supply standardized, undifferentiated products is competition at its purest; the objective: to obtain the lowest price possible. The virus that threatens competitive bid markets is not low prices; it is collusion. Between December 14, 1979 and January 10, 1991, the Department of Justice filed 346 indictments and informations in cases involving bid markets. All have involved collusion; none has involved monopolization of bid markets by a price cutter.

One consequence of the Sixth Circuit's decision is that firms may be tempted to divide the market to avoid the dangers of monopolization. Bid rigging, which is rampant and difficult to detect, may increase.

The holding that Johnson possessed monopoly power in a bid market rests on market share, but market share does not establish market power in a bid market. The fact that prices were low for more than fifteen years provides "strong evidence" that Johnson

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Work, *Antitrust Issues Relating to Arrangements and Practices of Government Contractors and Procuring Agencies In Markets for Specialized Government Products*, 57 Antitrust L.J. 543, 552 n.20 (1988). The Sixth Circuit's second decision thus may be looked to by the many sophisticated firms and attorneys involved in government contracting for guidance on the applicability and interpretation of the antitrust laws in the bid context.

lacks monopoly power. *Matsushita Electric Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 591 (1986). The Sixth Circuit avoided discussing when, if ever, a firm in a bid market may possess monopoly power, but the result it reached conflicts in principle with the decision of the Eighth Circuit in *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985).

The Sixth Circuit awards treble damages to a competitor for losses from non-predatory prices. This holding rewards the inefficient and punishes both the entrepreneur and the consumer. In holding that Langenderfer suffered antitrust injury, the Sixth Circuit apparently relied on acquisitons, but acquisitions, without more, do not give rise to antitrust injury to a competitor. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). The Sixth Circuit failed, however, to specify any conduct that caused the injury. The opinion finds no monopolization of raw materials, no dependence on Johnson for raw materials, and none of the anticompetitive acts alleged. In effect, the Sixth Circuit affirmed a finding of antitrust injury because Johnson profitably bid lower than Langenderfer. Upholding a finding of antitrust injury in such circumstances is inconsistent with this Court's decisions in *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990), *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Cargill*, 479 U.S. 104.

The Sixth Circuit's decision is of considerable economic significance to federal, state and local governments, which award billions of dollars of contracts annually through competitive bidding, and to the taxpayers who pay for these projects. The decision also

has broad implications for the administration of the antitrust laws because it potentially creates a new cause of action against those who succeed too well.

I. MONOPOLY POWER MAY NOT BE FOUND IN A GOVERNMENT CONTRACT BID MARKET WHERE ACTUAL AND POTENTIAL COMPETITORS ARE PRESENT

A. Market Share Does Not Establish Monopoly Power In a Bid Market

In upholding the jury's finding that Johnson possessed, or was likely to achieve, monopoly power, the Sixth Circuit relied primarily on data showing that Johnson had won fifty-eight percent of the relevant market contracts between 1972 and 1978:

> [T]he above data, accompanied by the paving contractor and asphalt plant acquisitions . . . are sufficient to indicate that Langenderfer may reasonably have proved the cause of action alleged, coupled with the defendants' high percentage of ODOT winning bids . . . and other circumstances of defendants' growing economic power.

(App. A60).[5]

The Sixth Circuit's reliance on market share evidence to support a finding of monopoly power in a bid market is misplaced. In a bid market, market share represents nothing more than the number of times a firm submitted the low bid; it is not a proxy for monopoly power. ABA Monograph, *Horizontal*

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[5] The Sixth Circuit discussed the paving contractor and asphalt plant acquisitions separately and concluded that none of them involved a significant competitor of Johnson in the relevant market. (App. A56-57).

Mergers: Law and Policy 159 (1986). Indeed, the Justice Department assigns an equal share to each firm in the market when evaluating concentration in bid markets. Department of Justice Antitrust Guidelines for International Operations, 53 Fed. Reg. 21584, 21602-03 (1988). This approach is consistent with precedent in this Court: "Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice." *United States v. El Paso Nat'l Gas Co.*, 376 U.S. 651, 661 (1964).

The market share evidence, showing annual swings in Johnson's market share of as much as forty-five percent, illustrates that market share cannot be equated with monopoly power in a bid market. A high market share in one year neither predicted nor guaranteed a high share in succeeding years. Rather than reflecting monopoly power, wide swings in market share reflect competitive vigor and an inability to exclude competition or to raise prices. *See* FTC Statement on Horizontal Mergers, 4 Trade Reg. Rep. (CCH) ¶ 13,200 at 20,902 (1982); 1984 Merger Guidelines of Department of Justice, 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,563-64.

B. Monopoly Power Cannot Exist In A Bid Market As Long As Other Firms Have The Ability To Compete

Monopoly power is the ability of a single firm "to raise prices above those that would be charged in a competitive market." *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984). Competitive bidding is the antithesis of monopoly power because no firm can successfully raise prices, absent collusion, and continue to win jobs.

The Eighth Circuit recognized this in *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985). *Alderson* involved a competitor challenge to the award of an annual court reporting contract. The plaintiff claimed that the successful bidder monopolized and attempted to monopolize court reporting services in the United States Tax Court by submitting a predatory, below-cost bid.

The Eighth Circuit affirmed summary judgment for the defendant, holding that the defendant lacked monopoly power as a matter of law because it could not raise prices and still win the contract. The court held that a single firm could not acquire monopoly power in a competitive bid market where there were several actual and potential bidders. *See also Kirk-Mayer, Inc. v. Pac Ord, Inc.*, 626 F. Supp. 1168 (C.D. Cal. 1986).[6]

Here, it was undisputed that there were many actual and potential competitors. Moreover, the Sixth Circuit recognized "that government bidding at low prices over a lengthy period was at the heart of this case" (App. A67), that Johnson's profit margins declined during the relevant time (*id.* at A63) and that "other competitors . . . have emerged as bidders . . . during the relevant years" (*id.* at A70). In upholding a finding of monopoly power, the Sixth Circuit ignored these facts. Its decision conflicts in principle with the holding of the Eighth Circuit in *Alderson*.

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[6] This is not to say that a bid market can never be monopolized. For example, where a firm engages in conduct to destroy the bid process or forecloses other firms from bidding, monopolization may be found. *See, e.g., Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987).

The holding that monopoly power might, as a matter of law, be established in such circumstances also conflicts with antitrust principles recognized by this Court. In *Cargill*, this Court held that the relevant inquiry is whether entry would occur during a period of supra-competitive prices. 479 U.S. at 119 n.15. Where, as here, entry occurred during a protracted period of low prices, entry would be likely if prices were to rise. In *Matsushita*, this Court stated:

> [W]ithout barriers to entry it would presumably be impossible to maintain supra-competitive prices for an extended time.

475 U.S. at 591 n.15. This Court also stated that the failure to raise prices over an extended period of time provides strong evidence that monopoly power does not exist. *Id.* at 592.

The Sixth Circuit decision upholding monopoly power cannot be reconciled with this Court's decisions in *Cargill* and *Matsushita*.

II. A MONOPOLIST'S LOW, NON-PREDATORY PRICES DO NOT GIVE RISE TO ANTITRUST INJURY TO A COMPETITOR

This Court's antitrust opinions make clear that a private antitrust plaintiff can sue only when the nature of its injury reflects the anticompetitive effects that make the conduct unlawful. "A private plaintiff cannot recover damages under § 4 of the Clayton Act merely by showing 'injury causally linked to an illegal presence in the market.' " *Atlantic Richfield*, 110 S. Ct. at 1889 (*quoting Brunswick*, 429 U.S. at 489). An "injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive

aspect of the practice under scrutiny. . . ." *Atlantic Richfield*, 110 S. Ct. at 1889. The antitrust injury requirement thus prevents an award of damages "for losses stemming from continued competition." *Cargill*, 479 U.S. at 109-10.

The Sixth Circuit relied on "acquisitions, elimination of competition, and other anticompetitive conduct by defendants" (App. A60-61), but offered no analysis of whether Langenderfer's injury reflected the anticompetitive effect that made such conduct unlawful. Had the Sixth Circuit done so, it would have seen that any finding of antitrust injury would be inconsistent with the decisions of this Court.

With respect to acquisitions and elimination of competition, the Sixth Circuit held that the acquisitions of paving contractors did not eliminate competition or significant competitors of Johnson. (App. A56-57). In any event, if the acquisitions had resulted in a lessening of competition, Langenderfer would have benefited from the resulting higher prices. *Matsushita*, 475 U.S. at 582-83. Without proof of anticompetitive conduct, the acquisitions standing alone could not give rise to antitrust injury to a competitor like Langenderfer. *Cargill*, 479 U.S. at 122.

In *Cargill*, the plaintiff alleged that a merger of competitors would result in efficiencies that would allow defendants to offer low, non-predatory prices with which the plaintiff could not compete. 479 U.S. at 115. This Court assumed that the merger would violate the antitrust laws. That was not enough to support a finding of antitrust injury to the plaintiff competitor. Quoting *Langenderfer I*, this Court held:

> To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition."

Id. at 116 (*quoting Langenderfer I* at 1057). The perverse result this Court refused to allow in *Cargill* is the precise result that follows from the Sixth Circuit's holding in favor of Langenderfer.

As regards anticompetitive conduct, the Sixth Circuit held there was none:

- **Monopolistic stone pricing:**

  "There was simply *no adequate evidence* to establish that defendants were engaged in monopolistic stone pricing, or that defendants controlled or attempted to control stone or quarrying in any relevant market claimed by plaintiffs." (App. A53) (emphasis as in the original).

- **Price squeeze:**

  "This contention was that "defendants have *used their monopoly power in stone* to gain an unfair advantage in paving." (emphasis added.) As we have seen, however, defendants did not have sufficient market power or price control in limestone to constitute monopoly power." (*Id.* at A54 n.26).

- **Tying:**

> "Nor was there meaningful evidence to show that defendants tied 'the sale of stone and sand to the sale of asphalt,' as contended by plaintiffs at trial. There was no showing that defendants controlled the sources or supply of sand in any relevant market claimed." (*Id.* at A53).

Although the Sixth Circuit alludes to "other anti-competitive conduct," no other alleged acts of anti-competitive behavior that might have injured Langenderfer were submitted to the jury. Nor did the Sixth Circuit identify any other evidence that might support a conclusion that antitrust injury could be found here.[7] There is no claim or evidence of injury to Langenderfer from increased prices; rather, "gov-

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[7] Johnson's raw material acquisitions do not support a finding of antitrust injury:

> [D]efendants may not be held liable for antitrust conduct to the extent that, as asphalt paving contractors, they acquired additional limestone and/or sand sources which added to their efficiency and ability to submit profitable and low bids. . . .

(App. A55). The court suggested that Johnson's quarry site acquisitions "foreclose[d] production and efficient use" of those quarries by Langenderfer. (*Id.* at A61). That suggestion is without antitrust significance. Even if Johnson's ownership of a particular quarry site "foreclosed" a competitor from using that site, there was no evidence that Johnson owned an essential facility. To the contrary, there were numerous quarries in the market (*id.* at A38) and many of them, including one owned by respondents, were better located than any owned by Johnson. (*Id.* at A31). Moreover, there was no refusal to deal or evidence of monopolistic stone prices. (*Id.* at A55).

ernment bidding at *low* prices was at the heart of this case." (App. A67) (emphasis added). This leaves Johnson's low, non-predatory bids as the only possible basis for Langenderfer's injury.

In *Atlantic Richfield*, this Court assumed the defendant had engaged in a vertical price-fixing conspiracy to maintain low prices. 110 S. Ct. at 1888 n.2. The Court recognized that the scheme was *per se* illegal. *Id.* at 1889. The plaintiff in the action, a competitor, argued that it suffered antitrust injury due to losses resulting from the lower prices of firms adhering to the illegal scheme. *Id.* at 1891. This Court rejected the claim and held categorically that, absent predatory pricing, competitor losses due to low prices are not antitrust injury. *Id.*

The affirmance of the judgment for Langenderfer is inconsistent with *Atlantic Richfield*. Like the plaintiff in *Atlantic Richfield*, Langenderfer's loss is attributable to the low, non-predatory prices of Johnson. Injury from low, non-predatory prices is not antitrust injury:

> Antitrust injury does not arise for purposes of § 4 of the Clayton Act, see n.1, *supra*, until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct, see *Brunswick*, 429 U.S., at 487; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. . . . Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

Atlantic Richfield, 110 S. Ct. at 1892 (emphasis as in the original) (citation omitted).

The Sixth Circuit's decision conflicts with *Cargill* and *Atlantic Richfield*. The opinion is not distinguishable from *Cargill* on the basis of a finding of anti-competitive conduct because the court held that none was proved. It is not distinguishable from *Atlantic Richfield* on the basis of predatory pricing because that too is not an issue in this case. The only difference between this case and *Cargill* and *Atlantic Richfield* is that the defendant here, Johnson, is allegedly a monopolist. The Sixth Circuit's opinion must then necessarily rest on the proposition that a monopolist, unlike other firms in the market, may not price its product below competitors' costs. The Sixth Circuit thus undermines its own holding in *Langenderfer I* by stating in effect that it is *not* "in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Langenderfer I*, 729 F.2d at 1057.

If the judgment is not reversed, the only way Johnson could avoid future treble damage liability would be to *raise* its prices. "It would be inimical to the purposes of these laws to award damages for the type of injury claimed here." *Brunswick*, 429 U.S. at 488. Judge Learned Hand warned of such potential abuse of the antitrust laws more than forty years ago:

> The successful competitor, having been urged to compete, must not be turned upon when he wins.

United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945). *See also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).

This Court warned in *Matsushita* against results like that reached by the Sixth Circuit:

> [C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly because they chill the very conduct the antitrust laws are designed to protect.

475 U.S. at 594. To protect against such mistakes, the Court should rule that competitor losses from low, non-predatory prices are not antitrust injury and that *Cargill* and *Atlantic Richfield* apply to competitive pricing by firms alleged to have monopoly power.

CONCLUSION

This petition for a writ of certiorari should be granted.

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No. 90-1623 (2)

Supreme Court, U.S.
FILED
MAY 21 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1990

S. E. JOHNSON COMPANY, *et al.*,
Petitioners,

vs.

ARTHUR S. LANGENDERFER, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT..... 3

REASONS FOR DENYING THE WRIT 5

I. Johnson's Petition Falsely Describes The Evidence At Trial And The Proceedings On Appeal..... 5

II. Johnson, Whose Monopoly Destroyed Competition, Now Asks This Court To Bless Its Misdeeds In The Name Of "Competition" 7

III. Johnson's Monopoly Power Is Even Greater Under The Alternative Test It Proposes 9

IV. The Sixth Circuit Correctly Held That Plaintiff Langenderfer Suffered Antitrust Injury 12

CONCLUSION..... 16

APPENDIX:

Certificate of Qualification for Arthur S. Langenderfer, Inc..... A1

Certificate of Qualification for S. E. Johnson Companies, Inc..... A2

ODOT Qualification Graph A3

TABLE OF AUTHORITIES

Cases

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 11

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 6

Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990) 15

Axis, S.p.A. v. Micafil, Inc., 870 F.2d 1105 (6th Cir.), *cert. denied*, 110 S. Ct. 83 (1989) 13

R.C. Bigelow v. Unilever, 867 F.2d 102 (2nd Cir. 1989) 15

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 12,14,15

Cargill Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 12,14,15

Arthur S. Langenderfer, Inc. v. S.E. Johnson Company (Langenderfer I), 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984) 1,6,8,12, 13,14,16

Arthur S. Langenderfer, Inc. v. S.E. Johnson Company (Langenderfer II), 917 F.2d 1413 (6th Cir. 1990), *rehearing denied*, Jan. 23, 1991 ..... 1,2,3,4, 5,6,8,13,14,16

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 12

National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020 (8th Cir. 1985) 11,12

Statutes, Constitution and Regulations

Sherman §2, 15 U.S.C. §2 3,4

53 Fed. Reg. 21584, 21603 9

U.S. Const., Amend. VII 2,7

Texts

ABA Antitrust Section Monograph 12, *Horizontal Mergers:* Law and Policy (1986) p. 159 9

No. 90-1623

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S. E. JOHNSON COMPANY, *et al.*,
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ARTHUR S. LANGENDERFER, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals reversed unanimous jury verdicts in favor of the antitrust plaintiffs *for the second time* in the fifteen-year history of these cases: *Langenderfer I,* 729 F.2d 1050; and *Langenderfer II,* 917 F.2d 1413. The plaintiffs in the trial

court have filed their own Petition for Writ of Certiorari in this Court to obtain review of shocking and unprecedented action by a Court of Appeals in *sua sponte* reversing verdicts on issues that were never before it and were never preserved in the trial court and in retrying the facts *de novo* in violation of the Seventh Amendment. Plaintiffs' Petition for Certiorari is docketed as Case No. 90-1581 and was filed on April 12, 1991. Defendants (petitioners herein) have waived a response to plaintiffs' petition.[1] The serious issues presented by plaintiffs' petition for certiorari in Case No. 90-1581 do indeed require the review and supervision of the Supreme Court in its responsibility over Courts of Appeals and that petition for certiorari should be granted.

The defendants (petitioners herein) now seek to avoid the minor reduced judgment of the Sixth Circuit after it ravaged the jury verdicts and trial court action in *Langenderfer II.* The questions presented here are nothing new and the reasons given for granting the writ are meritless. This Court should deny defendants' petition for certiorari but grant the plaintiffs' petition in Case No. 90-1581.[2]

We respectfully refer the Court to the Statement of the Case contained in Case No. 90-1581 for a full and fair summary of the proceedings and evidence below which is incorporated herein by reference.

---

[1] See letter from Merritt Neal Rains to Hon. William K. Suter, Clerk of the Supreme Court, dated May 10, 1991 wherein "respondents waive their right to file a brief in opposition" to the Petition for Certiorari in Case No. 90-1581. Given the admissions implicit in defendants' waiver, we trust the Court would not grant certiorari on the instant petition without likewise granting certiorari in Case No. 90-1581.

[2] References to the Appendix ("A_____") are to plaintiffs' Petition for Certiorari in Case No. 90-1581.

SUMMARY OF THE ARGUMENT

Defendants mislead the Court in persisting in their attempt to convert *Langenderfer II* into a predatory pricing case. It was not—it was a monopoly case under Sherman §2. The jury found that defendants monopolized and attempted to monopolize asphalt paving of Turnpike (OTC) and State (ODOT) highway paving contracts and construction materials supplied thereon in thirteen counties of Northwestern Ohio over a thirteen-year period (1972-85) (Jury's Ans. to Itgs., A74-84). The monopoly is intact today.

The jury found that defendants had obtained their monopoly power through thirteen acquisitions which wiped out independent competition in the supply of highway construction materials and eliminated five ODOT asphalt paving competitors (*Id.* A81). As a result of these acquisitions, defendants monopolized between 75% and 85% of Turnpike paving and 58% of OTC/ODOT paving over thirteen years (PX 69SA, 71A, C). This was fully supported by the evidence as the jury found in its answers to eighteen special interrogatories (with sixty subparts) as drafted by the defendants (A74-84). The trial court denied defendants' motion for *j.n.o.v.* or a new trial holding the jury's findings were fully supported by the evidence (A91-97).

Defendants' Petition[3] herein filed on April 22, 1991 by S. E. Johnson Company, *et al.* ("Johnson") for a Writ of Certiorari should be denied. Johnson continues to beg the very fact questions determined by two successive unanimous juries as if those issues had been undisputed and decided in Johnson's favor. The *Langenderfer II* jury found squarely against Johnson on every material issue, including "the likelihood that new competitors would enter the market if defendants were to attempt to raise prices" on which they were fully instructed (JA 208).[4] Plaintiffs' experts testified that there was no likelihood of new competition given the degree of defendants' control (JA 2644-52, 2837-41; TR 2878-86, TR 3350-54). Johnson continues to miscast this as a predatory pricing case,[5] but the evidence disclosed an ill-gotten, self-perpetuating monopoly obtained through acquisitions in violation of Sherman §2.

---

[3] Defendants below, S. E. Johnson Company, *et al.* filed their Petition for Certiorari on April 22, 1991, nine days after plaintiffs Langenderfer, *et al.* filed their Petition for Certiorari in Case Number 90-1581.

[4] *See, e.g.*, Johnson's Question Presented No. 1. The juries saw numerous exhibits (*e.g.*, PX 16) and heard more than a dozen fact and expert witnesses called by plaintiffs to testify on the question of whether competitors had entered or fled the market, and was fully instructed on the issue (JA 208).

[5] See Johnson's Question Presented No. 2.

REASONS FOR DENYING THE WRIT

I. Johnson's Petition Falsely Describes The Evidence At Trial And The Proceedings On Appeal.

Johnson's Statement of the Case reads like its final argument which failed to persuade the jury. In fact, the evidence did *not* show "no barriers to entry," "less efficient competitors," "invitations" to rig bids, "new entry" or "increased" competition (Petition pp 3-4, 7), but just the opposite. Johnson is ignoring the evidence and the jury's findings.[6] It is illuminating that *none* of Johnson's fact assertions are accompanied by record citation.[7] Of course, plaintiffs' evidence showed high barriers to entry (JA 908, 1430-34; TR 347, 1206-10), lack of entry, competitors abandoning the market altogether or avoiding bidding because of Johnson (PX 16; JA 797, 833, 925-34, 1044-57, 1097, 1540, 1726, 1737-42, 1808, 1850, 1967-97, 2186, 2312-15, 2405-06, 2418, 2428, 2481, 2573, 2644-51, 2685-88, 2837-40, 3123; TR 226, 262, 347, 403-32, 620-33, 721, 1206-10, 1400, 1638, 1649-54, 1755, 1807, 2011-42, 2240, 2365-68, 2470-71, 2483, 2493, 2594, 2639, 2878-85, 2943-66, 3350-53, 3762-65) equally efficient competitors (*e.g.*, JA 1536, 1744; TR 1396, 1656), which evidence defendants disputed, and, far from an "invitation to collude," only a desperate plea from Langenderfer's president to Johnson to stop its ruthless, anticompetitive behavior (JA 895, 1005, 2259; TR 330, 570, 2312) which was running Langenderfer out of business and which defendants succeeded in doing by 1978.

---

[6] This is not surprising because Johnson got away with it in the Court of Appeals where it received a trial *de novo* without regard to the jury's findings. See Sixth Circuit Opinion in *Langenderfer II* (917 F.2d 1413; A1-72).

[7] Johnson's statement (Petition at 5, n.3) that "the stated facts, all based on respondents' [plaintiffs'] evidence are not disputed" is false and misleading.

Johnson's Petition (p. 5) avoids the real reason the Sixth Circuit remanded *Langenderfer I* for a second trial (729 F.2d at 1058):

> Since Langenderfer premised its allegation of anticompetitive conduct almost entirely on the claim of predatory pricing and since the jury was not required to return special interrogatories, we cannot discern whether the jury verdict was based on the legally insufficient proof of predatory pricing or on the other allegations of anticompetitive acts. Consequently, we must vacate the judgment below and remand for new trial.

Notwithstanding the Sixth Circuit's misconception that the first trial was based "almost entirely" on predatory pricing, that was a non-issue in *Langenderfer II*. Predatory pricing was excluded *in limine* at the second trial (JA 176)[8], ensuring that the jury consider only "the other allegations of anticompetitive acts."

The second jury satisfied the Sixth Circuit's concern for precision by returning 18 answers to special interrogatories (with 60 subparts), all in plaintiffs' favor, even though they had been drafted by Johnson's counsel. The jury not only found monopoly power and a dangerous probability of achieving same, but anticompetitive conduct across the board, with no reference to predatory pricing.

---

[8] Predatory pricing was not mentioned at the second trial. Indeed, the trial court expressly told the jury: "I instruct you that defendants' profitable bidding does not constitute anticompetitive conduct as a matter of law, and you may not base a verdict on the fact that defendants were able to bid lower than competitors and still make a profit." (Court's Chg. at JA 218, 3815; TR 4950). The Sixth Circuit in *Langenderfer II* held that this instruction cured improper inferences that might otherwise have been drawn by the jurors about low bidding (917 F.2d at 1440; A53). The jury is presumed to follow the court's instructions. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985).

The Sixth Circuit's findings on the second appeal, on which Johnson relies (Petition p. 6) are based on that Court's *de novo* weighing of the evidence, not the jury's findings, and are the subject of the petition for certiorari filed by plaintiffs and pending in Case No. 90-1581, where plaintiffs maintain that the Court of Appeals flagrantly re-examined facts found by the jury in violation of the Seventh Amendment to the United States Constitution, warranting summary reversal by this Court.

II. Johnson, Whose Monopoly Destroyed Competition, Now Asks This Court To Bless Its Misdeeds In The Name Of "Competition."

Defendants' pious concern for the competitive process (Petition at 7) is laughable. So is their unsupported assertion that the Sixth Circuit decision may prompt competitors to rig bids. Johnson monopolizes the market—it has no need to rig bids! Johnson systematically bought out or ran out nearly every one of its major paving competitors, and has intimidated the remaining few into submission. Johnson now pretends ignorance of "whether its low bid, submitted in full compliance with the letter and spirit of competitive bid statutes, will be treated by the courts as aggressive competition or monopolizing conduct" (Petition at 8). To answer that question, Johnson need only look at the record:

- *if* Johnson's low bid is subsidized by exacting monopolistic prices from its bidding competitors for the raw materials that must be included in the bid (*e.g.*, JA 2664-67, 2845-51; TR 2898-2901; 3358-64);

- *if* Johnson's CEO Kirkby tells his competitors not to bid in his "territory" *or else,* and engages in other similar intimidation (*e.g.,* JA 1149, 1861, 3116-18; TR 780, 1818, 3745-49);
- *if* Johnson bids 90% to 100% of all contracts let (PX 147S); and
- *if* it has gained its extraordinary market shares (75-85% of the Turnpike market, PX 69, 69SA, 69C, and 58% of OTC/ODOT market over thirteen years (PX 71A, C) by thirteen acquisitions of competitors (PX 3),

then Johnson can be assured that its "low bid"[9] is *not* simply "aggressive competition," but "monopolistic conduct."

In general, competitive bidding may be "competition at its purest" (Petition at 8), but there was nothing "pure" about the way Johnson built its monopoly and then wielded the power to control the market. As the Sixth Circuit recognized on both appeals:

> "Substantial evidence indicated that Kirkby, both individually and as chief officer of Johnson, intended to eliminate competition and dominate the market *** [and that] Johnson's acquisitions significantly reduced competition and increased market concentration thereby creating a monopolistic market structure."

729 F.2d at 1054; 917 F.2d at 1471-18; A-68.

[9] Johnson's claim that its "low" bidding benefits the taxpayers is fraudulent. For over thirteen years, Johnson maintained high, rigid and non-competitive prices for the stone and sand it sold to its competitors or included in its asphalt bids, thereby charging the state and Turnpike authorities monopolistic prices for the materials included in its "low" bids. Defendants realized 100% gross margins at their biggest quarries (PX 106SAA-106SDD). Thus, they were able to leverage and cross-subsidize their paving bids, which plaintiffs' experts found to be anticompetitive (JA 2659-67, 2674, 2485-51; TR 2893-2901, 2908, 3358-64).

III. Johnson's Monopoly Power Is Even Greater Under The Alternative Test It Proposes.

Johnson criticizes the use of market share data to measure monopoly power in a bid market, proposing instead the approach endorsed in the ABA Antitrust Section Monograph 12, *Horizontal Mergers:* Law and Policy (1986) p. 159 and by the Justice Department, which assigns an equal share to each firm in the market (Petition at 10-11). The Monograph states (p. 159):

> If this approach is to be applicable, each 'qualified bidder' should have capacity that is large relative to the size of the market or can be easily expanded, such that each can bid on most every job. Where this condition is not satisfied, actual capacity may be a more appropriate measure of a firm's competitive significance.

Similarly, the Justice Department assigns equal market shares to bidding firms only "[i]f each . . . is a comparable participant in the market" (53 Fed. Reg. 21584, 21603, cited at Petition at p. 11).

Capacity in this case was measured by ODOT Qualification certificates. Firms that wish to bid in the coming year submit financial information to the State of Ohio, which issues certificates limiting the dollar amount of work that a firm may have in progress at any given time (*e.g.*, Johnson's and Langenderfer's most recent certificates, PX 9H, 68A2, JA 4103, 4219, attached).

The ODOT Qualification certificates told a dramatic story in this case (PX 68SB, attached). While Johnson's capacity to bid soared from $13 million in 1970 to $106 million by 1986, the capacity of those competitors who managed to keep bidding at all declined or stayed the same (with one exception, Miller, who still had only one third of Johnson's capacity, and whose financial strength

came largely from earth moving and coal, not asphalt paving). There was no comparability between Johnson and its pitiful "competitors." They could "bid" but they could not compete. By 1984, Johnson had 87% of the net worth in the market; 71% of the assets; 64% of the sales; and 91% of the net profit (PX 116B).

Johnson's petition is superfluous on this issue in any event, because the jury fully considered Johnson's argument, and by its findings (Ans. to Itg. 8, A79) must be presumed to have rejected it. The jury was instructed as follows (JA 207-08, 216):

> You have heard much evidence about the market shares of the parties in this case. Market share is one factor in deciding whether a firm possesses monopoly power. Generally, market share alone is not enough to determine the capacity to achieve monopoly. However, existence of monopoly may be inferred from a predominant share of the relevant market.
>
> If a company has less than 50% of the business in the relevant market, that may indicate that the company lacks monopoly power. In some cases, as a company's percent of the market in the relevant market increases, market share may take on more significance as evidence. *However, market share is not always a good indicator of the power of a firm to raise prices. You may also consider the fact that ODOT and OTC paving jobs are awarded through competitive bidding and the low bidder wins.*
>
> Monopoly power is the power of a single firm to control prices or exclude competition. For purposes of this case, you are to treat defendants as a single firm. In determining whether defendants have monopoly power, you may consider not only defendants' market share, but also the market share in the relevant markets of defendants' competitors wherever they are based, the number, strength, and

> size of competitors, *and the likelihood that new competitors would enter the market* if defendants were to attempt to raise prices. You may also consider defendants' size, but size in and of itself is not prohibited by the antitrust laws.
>
> * * *
>
> If the acquisitions made defendants more efficient or lowered their costs, that by itself is not forbidden by the antitrust laws. If, however, the acquisitions eliminated rivals and gave defendants the power to exclude other competitors through anticompetitive conduct, then that is forbidden.

(Emphasis supplied).

Johnson also argues (with no record support) that "wide swings in market share" prevent a finding of monopoly power (Petition at 11). From 1972-1985, Johnson's share of the Turnpike market was 75% to 85%; its average was 58% for OTC/ODOT combined over the same period. It took what it wanted. For example, it had 66.4% of all paving contracts over $1 million between 1979 and 1985 (PX 72B). Monopoly power is the power to control prices or exclude competition *when it is desired to do so. American Tobacco Co. v. United States,* 328 U.S. 781, 810 (1946). In 1974, the year in which Johnson's Turnpike (OTC) market share was zero, that was because there were *no jobs let by the Turnpike*! (PX 69SA). Instead, Johnson took 82% of the *entire* ODOT market (PX 70; JA 4251).

Johnson erroneously relies on *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985) for the proposition that a bidder could not have monopoly power because it could not raise prices and still win an annual exclusive contract. *National Reporting* is not at all factually similar to this case. In

National Reporting there was no evidence, as there was in this case, that the defendant acquired market power through thirteen acquisitions with intent to dominate the market; that defendant's competitors depended on it for raw materials; that the defendant overcharged for those materials, driving up the costs of its smaller competitors; of high barriers to entry; of a shrinking pool of competitors; or that the defendant intimated competitors to discourage them from bidding.

The *Cargill* and *Matsushita* cases (Petition at 13) might have some relevance if the evidence in this case had shown market entry or no barriers to entry, but of course just the opposite was true as plaintiffs' experts testified (JA 2644-52, TR 2878-86; JA 2837-41, TR 3350-54). See also PX 16, showing the six firms that left the market after Johnson's acquisitions. Furthermore, *Matsushita* did not involve an integrated monopolist charging its competitors monopolistic "in-put" prices for essential materials to leverage and cross-subsidize low bidding in the end market as was shown here. *See* fn. 9 *supra.*

IV. The Sixth Circuit Correctly Held That Plaintiff Langenderfer Suffered Antitrust Injury.

Johnson argues that plaintiffs did not suffer "antitrust injury" as defined in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 at 489: "that is to say injury of the type the antitrust laws were intended to prevent and that flows from that which made defendants' acts unlawful." *Id. See also Cargill Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986).

The Sixth Circuit has twice addressed the question of antitrust injury in these cases. In *Langenderfer I*, it held:

> . . . *Brunswick* requires that Langenderfer's injury result either from a lessening of competition due to the acquisitions or from 'anticompetitive acts made possible' by the acquisitions . . . [t]he issue of whether Langenderfer's injuries resulted from 'anticompetitive acts made possible' by the acquisitions *was properly a jury question.*

729 F.2d at 1058-1059 (emphasis added). This was the law of the case, which the trial court explicitly followed in its opinion denying defendants' *j.n.o.v.* motion on the issue of antitrust injury (A93-94).

In *Langenderfer II,* the Sixth Circuit adhered to its earlier holding and accepted the second jury's determination as to Langenderfer (917 F.2d at 1443, A60):

> Langenderfer has, we believe, made a sufficient factual showing to support the essence of the jury's finding that Langenderfer suffered antitrust injury by reason of defendants' conduct and that such injury resulted in significant part from 'a lessening of competition due to the acquisitions' or from 'anti-competitive acts made possible' by the acquisitions. [citing] *Langenderfer I* at 1058.

In *Axis, S.p.A. v. Micafil, Inc.,* 870 F.2d 1105, 1110 (6th Cir.), *cert. denied,* 110 S. Ct. 83 (1989), the Court of Appeals also commented on *Langenderfer I:*

> In [*Langenderfer*], one of the plaintiff's claims for treble damages was based on the defendant's acquisition of competitors. The plaintiff claimed that the acquisitions eliminated the competitive pressures of the acquired companies, thus permitting the defendant to engage in other monopolistic acts such as unfair pricing, profit squeezing and predatory bidding. We held that this allegation was sufficient to satisfy the *Brunswick*

> requirement of antitrust injury. The injury resulted "from anti-competitive acts made possible by the acquisitions."

(citations omitted). The *Axis* court, citing *Langenderfer I*, then stated that an acquisition itself could be the anticompetitive act that causes antitrust injury (*Id.*) just as the jury below found.

In this case, in the face of a shrinking market, defendants lessened competition by deliberately acquiring viable, profitable ODOT-qualified competitors and strategic natural resources[10] in building their monopoly. Those acquisitions and the resulting monopoly power *enabled them to engage in other anticompetitive acts* which ran two of the plaintiffs out of business and critically injured the others. That is "antitrust injury" directly caused by monopolistic conduct or the term has lost all rational meaning. The facts in *Brunswick* and *Cargill* are clearly distinguishable. In *Brunswick*, the plaintiff complained that defendants' acquisitions of *failing* bowling alleys *maintained competition* that caused plaintiffs to lose profits. In *Cargill*, plaintiffs admitted that the proposed acquisition would *increase* competition. 479 U.S. at 115 (*Langenderfer I*, 729 F.2d 1058). The defendants herein did not object to the district court's jury instructions on this point (Ct.'s Chg. at JA 215-16; TR 4952-53).

---

[10] Even the Sixth Circuit noted that "acquisitions by defendants of quarry sites coupled with the use of lengthy non-competition agreements and other circumstances did foreclose production and efficient use of such quarries and limestone by Langenderfer and others as competitors of defendants." (*Langenderfer II*, 917 F.2d at 1433; A61).

In answer to Special Interrogatory No. 10 (A81), the jury found that "[t]he acquisitions were all made to exclude and/or injure competition and increase Johnson's power which he succeeded in doing." That "alone satisfie[d] the requirement of *Brunswick*," 729 F.2d 1058, as the district court found. In denying the defendants' motion for *j.n.o.v.* on antitrust injury the district court reviewed the jury's answer to Interrogatory No. 10 (which as framed by defendants, only asked the jury to "describe *one or more* of the types of anticompetitive conduct . . . as briefly as possible."), and construed the answer to No. 10 as a finding that defendants did engage in anticompetitive conduct as set out in the jury's instructions, thereby reconciling a possible inconsistent interpretation of No. 10 with the general verdict (A94).

Interpreting *Brunswick* and *Cargill*, the Second Circuit recently wrote, "we have little doubt that antitrust injury to a competitor can be found when the market share of the merging firms threatens to be decisive." *R.C. Bigelow v. Unilever*, 867 F.2d 102, 108 (2nd Cir. 1989).

Johnson's discussion of *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990) (Petition at 13) is not applicable to this case. This Court in *Atlantic Richfield* was concerned with the rule against vertical maximum price-fixing and held that no antitrust injury resulted to a horizontal competitor from violation of that rule. 110 S. Ct. at 1895. Here, Johnson's acquisitions of its and plaintiffs' mutual competitors concentrated power in the hands of a monopolist, who then abused that power, causing plaintiffs' injury. If *Atlantic Richfield* is deemed to govern that situation, this Court will have sanctioned all monopolistic acquisitions of competitors when challenged by other competitors.

CONCLUSION

Johnson's petition misrepresents the evidence and ingenuously asks the Court to protect a monopoly in the name of competition. *Langenderfer II* was retried under the law of the case laid down in *Langenderfer I*. There was no error and certainly no miscarriage of justice except for the Sixth Circuit's reversal of four of the five plaintiffs. The petition should be denied. At the same time, we ask the Court to grant the Petition for Certiorari in Case No. 90-1581 to which Johnson has waived any response.

May 21, 1991

Respectfully submitted,

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BEST AV

AILABLE COPY

STATE OF OHIO

DEPARTMENT OF TRANSPORTATION

Certificate of Qualification

NUMBER
190

ISSUED
March 28, 1977
(Effective 4-1-77)

THIS CERTIFIES that ARTHUR S. LANGENDERFER, INC.
4690 West Bancroft Street, Toledo, Ohio 43615

has filed with the Department of Transportation a Financial Statement and Experience Questionnaire as required under Sections 5525.02 to 5525.09 inclusive of the Revised Code of Ohio, and is hereby qualified to submit bids on State Highway Projects not to exceed $ 3,800,000 less the contractual amount of all uncompleted work including non-highway work under contract at the time of submitting bid.

This Certificate limits the holder to the classification of work indicated below:

( ) Railroad Bridges and Construction Under Railroad Tracks

(X) General Contracting

( ) Paving	( )
( ) Rigid Paving	
( ) Flexible Paving	( )
( ) Low Type Bituminous Wearing Surfaces	
( ) Grading	( )
( ) Drainage Structures	
( ) Highway Bridges	( )

This Certificate is subject to revision if and when a change in the financial condition of the holder is in evidence and becomes invalid after March 31, 1978.

David R. Whan
Transportation Director

Harri P. Long
Administrator
Contractor Qualifications

Form CQ-3 · Rev. 4-73

PLAINTIFF'S EXHIBIT 9-H

STATE OF OHIO

DEPARTMENT OF TRANSPORTATION

Certificate of Qualification

NUMBER
433

ISSUED
April 18, 1986
Effective 5-1-86

THIS CERTIFIES that S.E. JOHNSON COMPANIES, INC.
P.O. Box 29A, Maumee, OH 43537

has filed with the Department of Transportation a Financial Statement and Experience Questionnaire as required under Sections 5525.02 to 5525.09 inclusive of the Revised Code of Ohio, and is hereby qualified to submit bids on State Highway Projects not to exceed $ 106,049,000 less the contractual amount of all uncompleted work including non-highway work under contract at the time of submitting bid.

This Certificate limits the holder to the classification of work indicated below:

(X) General Contracting

( ) Paving ( )
( ) Rigid Paving
( ) Flexible Paving ( )
( ) Low Type Bituminous Wearing Surfaces
( ) Grading ( )
( ) Drainage Structures
( ) Highway Bridges ( )

This Certificate is subject to revision if and when a change in the financial condition of the holder is in evidence and becomes invalid after April 30, 1987

Warren J Smith
Transportation Director

Administrator
Contractor Qualifications

Form CO-3 rev 1-81

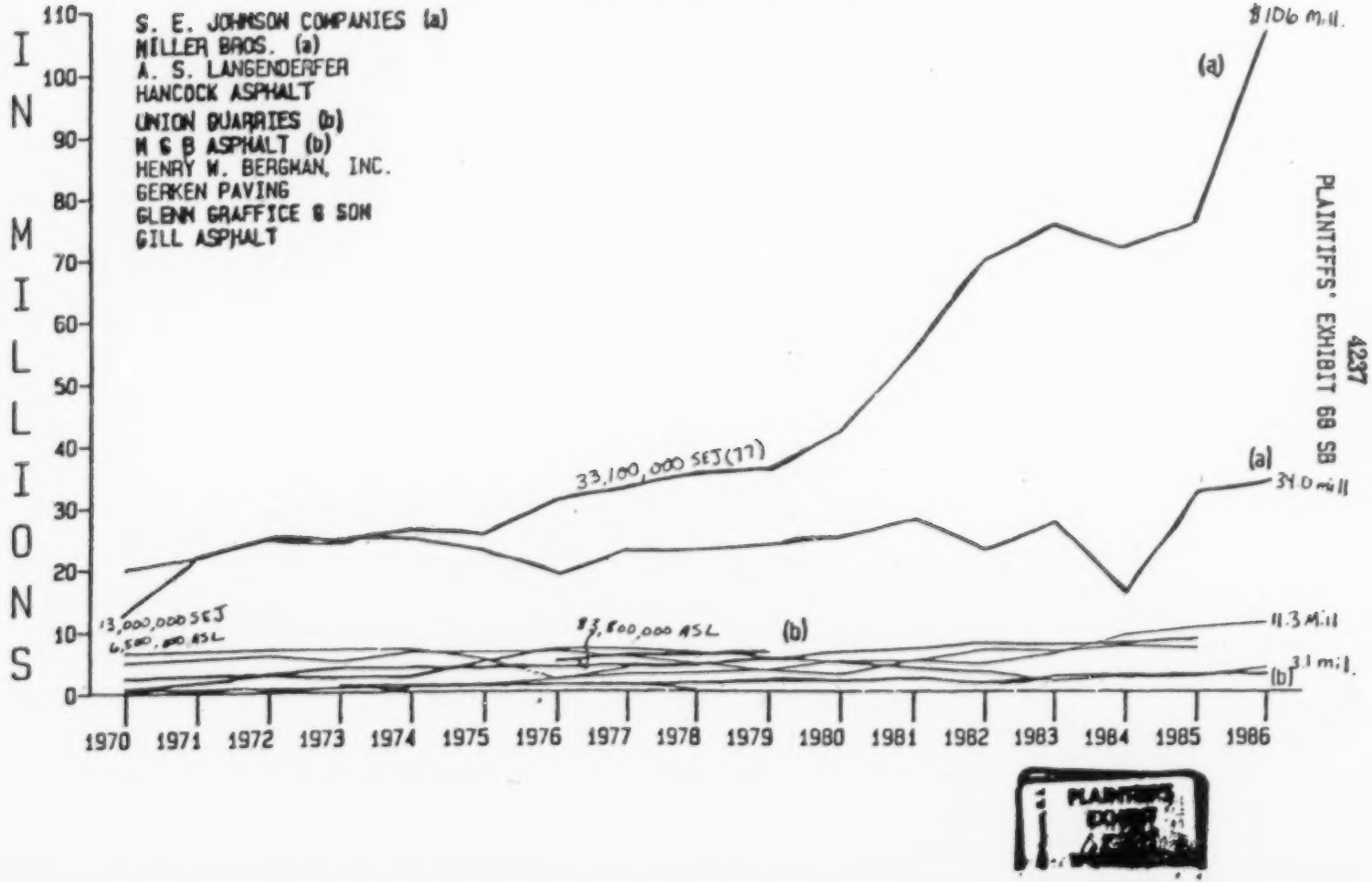
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PLAINTIFFS' EXHIBIT 68 SB 4237

(3)

No. 90-1623

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.E. JOHNSON COMPANY, *et al.*,
Petitioners,

v.

ARTHUR S. LANGENDERFER, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Petitioners, S. E. Johnson Company, et al. (collectively "Johnson") submit this Reply to the opposition of Respondents (collectively "Langenderfer").

Langenderfer's opposition does not address two important questions under the antitrust laws:

1) Whether monopoly power may be found in a government contract bid market absent collusion where there are many competitors and entry has occurred;

2) Whether a monopolist's lawful, above-cost pricing gives rise to antitrust injury.

Instead, Langenderfer ignores the opinion of the Sixth Circuit, ignores its own trial evidence and falsely accuses Johnson of misrepresenting the facts to the Court. The facts supporting Johnson's Petition are found in the Sixth Circuit's opinion.

Entry in the Bid Market

Langenderfer contends there were high barriers to entry in the bid market, no new entry, domination of market capacity by Johnson, and an insufficient number of competitors. These assertions were not supported by the evidence and were not sustained by the Sixth Circuit.

- The Sixth Circuit observed that there were "additional, substantial competitors in the marketplace for asphalt paving" (App. A14), and that "[o]ther competitors, not parties in this case, have emerged as bidders on these jobs during the relevant years" (App. A70).
- Langenderfer's *own* evidence at trial disclosed new entrants (Tr. at 330-31, 642-43; Px 31E, 164, 166).
- Langenderfer's *own* evidence at trial showed 51 firms bidding, and 23 winning jobs in the relevant market after Langenderfer's exit (Px 31D, 32A, 34A, 34B, 41A, 71B).

Langenderfer's assertion that the finding of monopoly power can be sustained by examining the capacity of the firms in the market is inapposite for two reasons: 1) the Sixth Circuit relied on market share, not capacity; and 2) the presence of 51 bidders and 23 winners belies any contention that Johnson controls a monopoly share of productive capacity. In

short, this case squarely presents the question of whether a firm may achieve monopoly power in a bid market free of collusion in which there are other competitors and in which entry has occurred.

Monopoly Power In The Raw Material Markets

Langenderfer asserts that this is not a predatory pricing case. Johnson agrees: Johnson's low, above-cost bids were lawful.

Langenderfer contends, however, that it suffered antitrust injury because Johnson subsidized low bids with monopolistic profits from sales of stone and sand to bidding competitors. Opposition at 7. Langenderfer ignores the evidence it introduced at trial, and disregards the Sixth Circuit's determination that there was no basis for finding monopoly power in any raw material market.

- The Sixth Circuit held that there was no showing that Johnson controlled the sources or supply of sand (App. A12, A17, A29, A53).
- The Sixth Circuit held that Johnson did not have monopoly power in limestone (App. A33-34, A40).
- Langenderfer's evidence showed that Johnson was only the second largest limestone producer (France Stone was larger), and that none of the competitors depended on Johnson for limestone. (Px 21, 21A; Tr. at 270, 1917).

Absent monopoly power in raw materials, and the opinion below establishes there was none (App. A55), the only conduct that might have injured Langenderfer is Johnson's admittedly lawful bids.

Conclusion

For the reasons stated, Petitioners request this Court to grant their Petition so that the important questions presented may be reviewed. Indeed, since Respondents have failed to address the questions presented, Petitioners suggest that summary reversal is now in order.

Respectfully submitted,

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